STATE OF MICHIGAN

COURT OF APPEALS

EDGAR HERNANDEZ,

Plaintiff-Appellant,

V

TAYLOR COMMONS LTD PARTNERSHIP and C.O. MANAGEMENT SERVICES, INC.,

Defendants-Appellees,

and

BORMANS, INC., d/b/a FARMER JACK,

Defendant.

UNPUBLISHED
June 29, 2004

No. 247576
Wayne Circuit Court
LC No. 02-205880-NO

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff, who delivers and stocks baked goods at retail food stores, stepped in a parking lot pothole while descending from his delivery truck as he delivered product to a Farmer Jack grocery store in the early morning hours of June 10, 2000. Plaintiff filed a premises liability suit alleging negligence and asserting that he twisted his left ankle and suffered an injury as a result of stepping in the pothole. The trial court granted defendants' motion for summary disposition, implicitly finding that the pothole was open and obvious and noting that plaintiff had previously worked in the area around the pothole without incident. The trial court concluded that the pothole did not create an unreasonably dangerous hazard and that the incident could have been avoided. We affirm.

I. COMPLAINT

Plaintiff alleged that, at the time of the accident, he was on defendants' property for business purposes that benefited defendants. Plaintiff maintained, therefore, that he held the status of "a business invitee and/or licensee." Plaintiff alleged that defendants owed a duty to provide a safe place of business, to exercise due care in the operation and maintenance of the premises so as to prevent injury, to warn plaintiff of dangerous conditions that were known or should have been known, and to correct all defective conditions.

Plaintiff asserted that defendants breached their duties of care by negligently maintaining a dangerous and defective condition on a portion of the premises where invitees traversed, i.e., potholes in the vendor receiving area of the store parking lot, by failing to take precautionary measures to correct or alleviate the dangerous and defective condition, and by failing to keep the parking lot safe and free from obstructions. Further, defendants were allegedly negligent in failing to provide a safe means of ingress and egress to persons who were required to deliver goods to the store and in failing to provide an alternate avenue for deliveries thereby forcing plaintiff to confront the dangerous and defective condition.

Plaintiff alleged that the injuries to his ankle caused chronic pain syndrome or causaligia or reflex sympathetic disorder. He sought recovery for pain and suffering, impairment of earning capacity, and medical expenses.

II. SUMMARY DISPOSITION

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), claiming, in pertinent part, that plaintiff had traversed the area of the pothole two or three times without incident on the morning that he fell, that plaintiff had made hundreds of deliveries to the store without incident and was familiar with the parking lot, that plaintiff had previously complained to Farmer Jack employees on several occasions about the "potholed" condition of the parking lot, and that plaintiff was in a hurry and not paying attention when he stepped in the pothole that was easily visible and avoidable had he been looking. Defendants further argued that the pothole and surrounding potholes were well-known, apparent, and detectable by an average person with ordinary intelligence upon casual inspection. As such, the potholes were open and obvious thus relieving defendants of any potential liability. Defendants also maintained that the sun had risen by the time of the accident, which assured that there was adequate illumination for viewing any potholes.

Plaintiff responded by denying that he had traversed the area of the pothole two or three times directly before the fall, but plaintiff admitted that he regularly delivered goods to the store, that he was in a hurry to complete his delivery as is typical, and that he was aware that the parking lot was a minefield of potholes. Plaintiff stated that several drivers had complained to Farmer Jack employees regarding the poor condition of the parking lot. He argued that the pothole was not open and obvious because at the time the delivery was made it was dark outside and one could not see the pothole. Plaintiff further argued that special circumstances existed regardless of whether the pothole was open and obvious, where delivery drivers' sole access to the store was over an area that was covered with potholes; therefore, the potholes were unavoidable and the open and obvious danger doctrine could not be utilized as a valid defense.

In reply, defendants argued that whether plaintiff actually noticed the pothole as he stepped down from his truck was irrelevant, and they again claimed that the sun had already risen when the accident occurred, thus precluding plaintiff's illumination argument. Further, the

pothole was avoidable as reflected by the numerous times plaintiff and other store vendors made deliveries without incident or injury.[1]

The trial court initially took the motion for summary disposition under advisement and then rendered a ruling from the bench at a subsequent hearing. The trial court stated:

> I'm going to grant the motion. I don't think that there's any special circumstances about this situation. It's true that the plaintiff had been through this area before. He said he's been [in] this very area that same morning. Even viewing the – and I am viewing the fact in the light most favorable to the plaintiff. It was getting light out.
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> But even if it was somewhat dark, there's numerous cases citing that lighting is not dispositive, that the lighting issue doesn't change anything. There was nothing unusual about this. He had been there before. He had been there that day. It was avoidable. It wasn't unreasonably dangerous.
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> And I think that's what the law of Michigan is today. I can't say that I personally agree with it. I don't think that people walk, especially people who are busy at work doing their daily tasks, don't walk looking at the ground. You might be carrying something. I just don't think it's a realistic rule.
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> However, the case law I believe is pretty clear and in Michigan we really don't even have slips and falls anymore that are recoverable. Only in the very most unusual circumstances, and I don't think that this case presents that, so I am going to grant the motion for summary disposition.

Plaintiff filed a motion for reconsideration, arguing that the trial court's ruling granting the motion for summary disposition contained palpable error in that the hazard which existed was effectively unavoidable thereby creating a "special aspect" of the hazardous condition, and because the open and obvious doctrine cannot be applied to avoid liability where a duty to maintain the premises was created by statute. Defendants responded, arguing that the "statutory duty" argument was never plead, argued, or alleged and, accordingly, the argument is barred. With respect to whether the hazard was unavoidable, defendants maintained that the argument had already been presented to the trial court and could not be revisited.

At a hearing on defendants' motion for case evaluation sanctions and taxable costs, the trial court also addressed the motion for reconsideration and denied it without explanation or comment.

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[1] We have reviewed the documentary evidence submitted by the parties with respect to the motion for summary disposition. We shall address the evidence below as it relates to our discussion of the appellate issues.

III. ANALYSIS

A. Motions for Summary Disposition and Reconsideration – Tests

On appeal, plaintiff challenges the trial court's rulings granting the motion for summary disposition and denying the motion for reconsideration. MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has held that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in regard to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* The burden then shifts to the party opposing the motion to establish that a genuine issue of disputed fact exists. *Id.* All affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion for summary disposition is properly granted. *Id.* at 363.

Regarding the motion for reconsideration, MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

B. Standards of Review

This Court reviews de novo a trial court's ruling on a motion for summary disposition made under MCR 2.116(C)(10). *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). We review for an abuse of discretion a trial court's ruling on a motion for reconsideration. *Churchman v Rickerson,* 240 Mich App 223, 233; 611 NW2d 333 (2000).

C. General Principles of Premises Liability

A premises owner owes, in general, a duty to an invitee[2] to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty,

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[2] The parties agree that plaintiff was an invitee.

however, does not generally encompass removal of open and obvious dangers. *Id.* Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. *Id.*, quoting *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992). "In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517.

Our Supreme Court in *Lugo, id.* at 518, providing examples of "special aspects," stated as follows:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken.

Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk or hazard is not avoided will serve to remove that condition from the open and obvious danger doctrine. *Id.* at 519.

D. Documentary Evidence

Plaintiff testified in his deposition that as part of the usual delivery and service procedure at Farmer Jack, he would arrive at the store, check in with the receiving clerk, go into the store and view the shelves for which he was responsible, pull outdated and stale goods from the shelves, determine what goods needed to be stocked and filled and type the information into a handheld device, and then take the stale goods to the store's backroom and leave them there temporarily. Thereafter, plaintiff would return to his truck in order to gather up the baked goods to stock on the shelves, reenter the store with the goods where they would be checked in by the receiving clerk with the stale goods being checked out, stock the fresh goods, and then leave the store. The accident occurred while defendant was in the process of retrieving fresh goods from his truck to stock in the store.

Defendant described the accident as follows:

> I'm pulling the dolly back, and I get out and I step on my left side. When I am coming off the truck having my dolly twisted, I got the edge of this hole that

> was there right by my tire that I didn't notice . . . until I stepped on it. So it was right by my tire and I never saw it because I never went that way [on] that particular day. I had a lot of product so I had to lean forward getting out [of] the truck so I could have more balance.
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> * * *
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> And when I stepped on it, I let go of the dolly and let go of everything, but my foot went in or out and I fell into the hole falling with my shoulder . . . .

Plaintiff stated that he did not pay attention to where he was stepping while alighting from the truck. He delivered goods to the store every week. Plaintiff, who was paid a commission, worked at a fast pace, including the day of accident on which one of his major selling products was on sale. He testified that the accident occurred around 6:00 a.m., 6:15 a.m., or six something; he was unsure. Plaintiff subsequently indicated that it would be fair to say that it occurred sometime between 6:15 a.m. and 6:30 a.m. In the deposition, he stated that "[a]fter I had delivered and been there it started getting more daylight." Plaintiff testified that there was only one delivery area that could be used by vendors to deliver product to the store.

In an affidavit executed by plaintiff and submitted to the trial court for purposes of summary disposition, plaintiff averred that he fell sometime between 6:00 a.m. and 6:30 a.m. and that the pothole was three to six inches deep. He also asserted that "[a]t the time of the fall it was dark outside, although the sun was beginning to rise." With the motion for reconsideration, plaintiff submitted a new affidavit which averred that he did not see any potholes as he alighted from his truck, that it was dark outside, and that he "had no alternative but to walk over the potholes in order to make . . . deliveries and keep . . . employment."

The trial court also received deposition testimony by Janet Parcher, the receiving clerk at Farmer Jack at the time of the accident. Parcher testified that there were numerous potholes in the parking lot with the greatest concentration being located by the store's receiving doors. She stated that many drivers and vendors had complained about the potholes and even warned that someone was eventually going to get hurt. Parcher asserted that plaintiff was one of the individuals who had complained about the condition of the parking lot in the receiving area, and he was clearly aware of the potholes. Parcher testified that the potholes were readily apparent, open and obvious, and could easily be seen by the casual observer.

She further testified regarding illumination, natural and manmade. Parcher indicated that the accident occurred sometime between 6:15 a.m. and 6:30 a.m. She stated that it was still somewhat dark out, but it was turning to daylight with the sun not yet completely out. Parcher thought it could be best characterized as being "dim" outside. Further, there were lights that illuminated the parking lot. In general, the parking lot was not well lit, but there was sufficient lighting around the receiving doors according to Parcher. Plaintiff's truck was parked about forty feet away from the doors. Parcher believed that there had been generally adequate lighting necessary to visualize the potholes and that one could see the pertinent pothole at the time of the accident if looking.

Parcher testified that vendors had to park in the delivery area in order to make deliveries and that plaintiff was required to utilize the particular receiving doors to deliver product. She

stated that the parking lot was repaved shortly after the accident. A paving company bid proposal, which is actually dated five days prior to the accident and which was submitted to the trial court, states that the work would include removal of approximately 4,238 square feet of "badly broken asphalt."

Defendants submitted a document that was apparently pulled of a website that included information regarding the times of sunsets and sunrises, and the document reflects that the sun rose at 5:57 a.m. in the area of the Detroit Metropolitan Airport on the morning of June 10, 2000, the date of the accident.

Attached to plaintiff's motion for reconsideration was an affidavit executed by John Lear. The affidavit had not been submitted previously. Lear averred that he was a delivery driver who made regular stops at the Farmer Jack at issue. He asserted that he met plaintiff several years before the accident while making a delivery. Lear claimed that on the day of the accident, he left Farmer Jack at approximately 5:45 a.m. to 6:00 a.m. after making a delivery. He recalled that he spoke with plaintiff for about five minutes and then left the store. Lear also indicated that it was dark at the time. Plaintiff's affidavit, the one submitted on reconsideration, averred that he fell about ten minutes after Lear departed.

E. Discussion

Summary Disposition

Plaintiff first argues that the danger of the pothole was unavoidable because traversing the area was absolutely necessary if plaintiff wished to deliver goods to the store; there was no alternate route or choice. Therefore, this fact created a special aspect of the hazardous condition as defined in *Lugo.* Plaintiff also argues that, although the pothole may have been open and obvious in broad daylight, it certainly was not readily observable and open and obvious in darkness.

In *Lugo*, the plaintiff fell after stepping in a pothole in the defendant's parking lot. The Court stated that typical open and obvious dangers such a potholes do not give rise to special aspects and cannot form the basis of liability on behalf of the premises possessor. *Lugo, supra* at 520. A pothole does not involve an especially high likelihood of injury, and there is little risk of severe harm. *Id.* An ordinarily prudent person would typically be able to see the pothole and avoid it. *Id.* The Court, in holding that summary dismissal was proper, concluded:

> [P]otholes in pavement are an "everyday occurrence" that ordinarily should be observed by a reasonably prudent person. Accordingly, in light of plaintiff's failure to show special aspects of the pothole at issue, it did not pose an unreasonable risk to her. [*Id.* at 523.]

Here, we likewise find, contrary to plaintiff's argument, that the pothole was not effectively unavoidable; therefore, there did not exist a special aspect of the hazard or pothole that would preclude application of the open and obvious danger doctrine. There was not a uniquely high likelihood of harm. Plaintiff confuses the unavoidability of vendors using the parking lot and single receiving area with the unavoidability of stepping in a pothole. Clearly, stepping in a pothole was avoidable as seen by the hundreds of occasions on which plaintiff and

other vendors traversed the receiving area without incident. There is no indication in the record that it was near impossible to walk in the receiving area without stepping in a pothole. As stated in *Lugo, supra* at 518, the open and obvious doctrine does not apply where "the *open and obvious condition* is effectively unavoidable." (Emphasis added.)

The example given in *Lugo* involved a sole exit covered with standing water through which the general public had to walk. The open and obvious condition, or, in other words, the dangerous or defective condition, was the standing water, and the public could not avoid "wading" through the water, which could potentially cause a slip and fall. Here, the dangerous or hazardous condition was an accumulation of potholes that vendors were not forced to step in with hope that they could keep their balance; they could sidestep or avoid the potholes when working in the receiving area.

Plaintiff places partial reliance on two unpublished cases from this Court. The reliance is misplaced. Of course, we initially note that unpublished opinions do not constitute binding precedent. MCR 7.215(C)(1). Further, the cases are distinguishable because they involved situations where the plaintiffs had no choice but to directly encounter and step on the hazardous condition, risking injury. In the case at bar, vendors, including plaintiff, did not have to walk or step in the potholes. To the contrary, plaintiff and other vendors could avoid the hazard by simply walking around the potholes; they were not forced to directly encounter the potholes and risk injury. Once again, use of the parking lot/receiving area may have been unavoidable, but the hazard, i.e., the potholes, were avoidable.

Plaintiff next relies on illustrations set forth in 2 Restatement Torts, 2d, § 343A, which reflect situations where liability exists despite the open and obvious nature of the hazard or dangerous condition. The first example cited by plaintiff involves a waxed and slippery stairway that is the only means of ingress and egress to an office. The second example involves the use of a footbridge, which is the only convenient access to a railroad station, and which bridge is covered with snow and ice.

Both of these examples require the pedestrian-user to directly encounter the hazard. The user must actually step on the waxed and slippery floor or step on the icy and snowy footbridge. In the case *sub judice*, plaintiff was not effectively required to step in the pothole to deliver his baked goods. The *hazardous condition*, which was open and obvious, was not unavoidable.

We conclude, consistent with the ruling in *Lugo* regarding potholes, that plaintiff failed to establish the existence of a special aspect.

In a cursory manner, plaintiff also presents the following argument:

> [A]lthough the pothole may be open and obvious in broad daylight, it certainly was not readily observable and open and obvious in darkness. At best, this is a question of fact and looking at the facts in a light most favorable to plaintiff, there is no doubt that the hole in the pavement was not open and obvious.

We hold that plaintiff's argument fails on multiple levels. First, plaintiff testified that he was not paying attention to where he was stepping when descending from his truck. Therefore,

even had it been broad daylight, plaintiff would have stepped in the pothole because he was not looking down. We note that, even assuming it is permissible to take into consideration the self-serving affidavits submitted by plaintiff and assuming that it was dark outside, there was no claim that the darkness or the inability to see was the reason that plaintiff did not notice the pothole and stepped in it. For that matter, there is no documentary evidence reflecting a claim by plaintiff that the level of darkness prevented one from seeing the pothole directly below him.

Next, once again accepting that it may have been somewhat dark because of the time of day, there was no evidence contradicting the testimony about the parking lot and receiving door lighting that illuminated the area aside from the rising sun. Parcher testified that the parking lot lighting was generally adequate to visualize the potholes.

Finally, the *Lugo* Court stated that premises liability does not arise where the dangers are known to the invitee *or* are so obvious that the invitee might reasonably be expected to discover them. *Lugo*, *supra* at 516. Plaintiff, knowing that the parking lot and receiving area was peppered with potholes, should have been more vigilant especially if the lighting was limited.

The trial court properly granted defendants' motion for summary disposition.

Motion for Reconsideration

In plaintiff's motion for reconsideration, he argued that the open and obvious danger doctrine cannot be used to avoid a specific statutory duty. Plaintiff maintained that the city of Taylor, wherein the accident occurred, adopted by reference the BOCA[3] *National Property Maintenance Code* under the authority of the State Construction Code Act, MCL 125.1501 *et seq.*[4] The relevant code, according to plaintiff, is Section 302.3, which provides:

> All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.

Plaintiff further argued that there was clear documentary evidence that the parking lot was defective and in need of repair when plaintiff fell. Plaintiff claimed that the violation of the local ordinance or code was in effect a violation of state law and, therefore, application of the open and obvious danger doctrine was precluded. The trial court, as noted above, denied the motion in cursory fashion. Plaintiff now presents the same argument on appeal.

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[3] Building Officials and Code Administrators.

[4] The construction code is now known as the Stille-DeRossett-Hale single state construction code act. MCL 125.1501. We note that the document submitted by plaintiff as showing the city's adoption of the BOCA code cites MCL 117.3(k) as the statutory authority or basis for adopting the code, not the construction code. MCL 117.3(k) is part of the Home Rule City Act, MCL 117.1 *et seq.*

In *Jones v Enertel, Inc*, 467 Mich 266, 269; 650 NW2d 334 (2002), the Michigan Supreme Court held that the open and obvious doctrine of common-law premises liability cannot be utilized to defeat a claim that a municipality violated its statutory duty under MCL 691.1402 to maintain a sidewalk on a public highway in reasonable repair. The Court stated:

> [A]s we discussed in *Lugo*, this duty [to exercise reasonable care to protect invitees] does not generally require a premises possessor to remove open and obvious conditions because, absent special aspects, such conditions are not unreasonably dangerous precisely because they are open and obvious. However, such reasoning cannot be applied to the statutory duty of a municipality to maintain sidewalks on public highways because the statute requires the sidewalks to be kept in "reasonable repair." The statutory language does not allow a municipality to forego such repairs because the defective condition of a sidewalk is open and obvious. Accordingly, we conclude that the open and obvious doctrine of common-law premises liability cannot bar a claim against a municipality under MCL 691.1402(1). [*Jones, supra* at 269.]

In *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002), amended on other grounds 666 NW2d 665 (2003), the Supreme Court reiterated the principle, stating that "[t]he open and obvious doctrine cannot be used to avoid a specific statutory duty." *Woodbury* involved the "reasonable repair" requirement of MCL 554.139(1)(b)(landlord covenants implied by law).

We decline to determine whether the BOCA code regarding property maintenance, as allegedly adopted by the city of Taylor through authority granted by the Legislature, establishes a "specific statutory duty" such that its application precludes consideration of the open and obvious danger doctrine. Initially, we note that the two single-sheet exhibits submitted by plaintiff in support (adoption of BOCA code document and general requirements document) do not make clear that they apply to the city of Taylor, nor is the context clear concerning their applicability.[5] We do acknowledge the affidavit of plaintiff's counsel indicating that he visited the city's building department and inquired about codes concerning the maintenance of commercial parking lots and that he was informed that the city had adopted the BOCA code as reflected in the exhibit given to him showing the adoption. We question whether this is sufficient for purposes of submitting admissible documentary evidence in relation to summary disposition. Regardless, plaintiff's argument fails because the argument was not presented in response to the motion for summary disposition and there was no allegation in the complaint and amended complaint asserting a cause of action or claim for violation of city code.

In *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730; 405 NW2d 151 (1987), the plaintiff raised issues and arguments in a motion for reconsideration that were not pled in the complaint nor raised during summary disposition. The *Charbeneau* panel ruled: "We find no

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[5] For example, it is unclear whether the code applies to residential or commercial properties or both.

abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Id.* at 733.

Jones was issued by our Supreme Court in September 2002, and plaintiff cites even earlier cases suggesting that the open and obvious doctrine cannot be used to avoid a specific statutory duty, e.g., *Walker v Flint*, 213 Mich App 18; 539 NW2d 535 (1995). Defendants' motion for summary disposition was filed in October 2002, yet plaintiff chose not to raise the argument in response to the motion. Furthermore, plaintiff did not plead a cause of action or make a claim predicated on a violation of local code in his complaint and amended complaint, nor did plaintiff attempt to file a second amended complaint to add such a claim.[6] We find no abuse of discretion with respect to the trial court's denial of the motion for reconsideration.

IV. CONCLUSION

The trial court did not err in granting defendants' motion for summary disposition where, as a matter of law, the pothole hazard was open and obvious and special aspects did not exist, and where the possible lack of illumination was not relevant and insufficiently contradicted. Further, the trial court did not abuse its discretion in denying the motion for reconsideration, where plaintiff failed to present the code-violation argument in response to defendants' motion for summary disposition, failed to allege such a violation in the complaint, and failed to seek leave to amend the complaint to add the claim despite the existence of possible supporting case law at the time.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen

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[6] MCR 2.116(I)(5) provides that "[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." No request to amend the complaint was made by plaintiff.